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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-785

CONSUMERS UNION OF UNITED STATES, INC.,
Petitioner,

v.

COMMITTEE FOR THE IMPLEMENTATION OF
TEXTILE AGREEMENTS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES N. BARNES
LEONARD C. MEEKER
GEORGE C. DEPTULA
Center for Law and Social Policy
1751 N Street, N.W.
Washington, D.C. 20036
(202) 872-0670

Attorneys for Petitioner

MARK SILBERGELD
Consumers Union of United States
1714 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Of Counsel

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Consumers Union of United States, Inc. ("Consumers Union"), on behalf of itself and its members, consumers of textile products, hereby respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case April 20, 1977. Petitioner's petition for rehearing *en banc* was denied on September 2, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, pp. 16a-21a) is reported at 561 F.2d 872 (1977). The opinion of the District Court (App., *infra* pp. 1a-15a) has not been reported.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on April 20, 1977. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on September 2, 1977, and this petition is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that the Customs Court has exclusive jurisdiction over Petitioner's challenge, under Section 204 of the Agricultural Act of 1956, to the administration of the United States program regulating the importation of textiles and textile products into the United States, when Petitioner could never invoke Customs Court jurisdiction after first protesting to the Customs Service and when the Customs Court could not grant Petitioner relief.

2. Whether the Court of Appeals erred in holding that the District Court does not have jurisdiction under 28 U.S.C. §§ 1331, 1337 and 1361 to hear Petitioner's challenge to the administration of the United States program regulating the importation of textiles and textile products into the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved include U.S. Constitution, Article I, § 8, Cl. 3, 7 U.S.C. § 1854, 28 U.S.C. § 1582, and 19 U.S.C. §§ 1514 and 1516, which provide in relevant part:

U.S. Constitution, Art. I, § 8, Cl. 3:

> "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations . . . ."

Section 204 of the Agricultural Act of 1956, Act of May 28, 1956, 70 Stat. 200, as amended by Pub. L. 87-488, 76 Stat. 104, 7 U.S.C. § 1854:

> "The President may, whenever he determines such action appropriate, negotiate with representatives of foreign governments in an effort to obtain agreements limiting the export from such countries and the importation into the United States of any agricultural commodity or product manufactured therefrom or textiles or textile products, and the President is authorized to issue regulations governing the entry or withdrawal from warehouse of any such commodity, product, textiles, or textile products to carry out any such agreement. In addition, if a multilateral agreement has been or shall be concluded under the authority of this section among countries accounting for a significant part of world trade in the articles with respect to which the agreement was concluded, the President may also issue, in order to carry out such an agreement, regulations governing the entry or withdrawal from warehouse of the same articles which are the products of countries not parties to the agreement. Nothing herein shall affect the authority provided under section 624 of this title."

Act of June 25, 1948, 62 Stat. 943, as amended by § 110 of the Act of June 2, 1970, Pub. L. 91-271, 84 Stat. 278, 28 U.S.C. § 1582:

> "(a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, where the administrative decision, including the legality of all orders and findings entering into the same, involves: (1) the appraised value of merchandise; (2) the classification and rate and amount of duties chargeable; (3) all charges or exactions of whatever character

within the jurisdiction of the Secretary of the Treasury; (4) the exclusion of merchandise from entry or delivery under any provisions of the customs laws; (5) the liquidation or reliquidation of an entry, or a modification thereof; (6) the refusal to pay a claim for drawback; or (7) the refusal to reliquidate an entry under section 520(c) of the Tariff Act of 1930, as amended.

"(b) The Customs Court shall have exclusive jurisdiction of civil actions brought by American manufacturers, producers, or wholesalers pursuant to section 516 of the Tariff Act of 1930, as amended.

"(c) The Customs Court shall not have jurisdiction of an action unless (1) either a protest has been filed, as prescribed by section 514 of the Tariff Act of 1930, as amended, and denied in accordance with the provisions of section 515 of the Tariff Act of 1930, as amended, or if the action relates to a decision under section 516 of the Tariff Act of 1930, as amended, all remedies prescribed therein have been exhausted, and (2) except in the case of an action relating to a decision under section 516 of the Tariff Act of 1930, as amended, all liquidated duties, charges or exactions have been paid at the time the action is filed.

"(d) Only one civil action may be brought in the Customs Court to contest the denial of a single protest. However, any number of entries of merchandise involving common issues may be included in a single civil action. Actions may be consolidated by order of the court or by request of the parties, with approval of the court, if there are common issues."

Section 514 of the Tariff Act of 1930, as amended by § 207 of the Act of June 2, 1970, Pub. L. 91-271, 84 Stat. 284, 19 U.S.C. § 1514:

"(a) Except as provided in section 1501 of this title (relating to voluntary reliquidations), section

1516 of this title (relating to petitions by American manufacturers, producers, and wholesalers), section 1520 of this title (relating to refunds and errors), and section 1521 of this title (relating to reliquidations on account of fraud), decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—

(1) the appraised value of merchandise;

(2) the classification and rate and amount of duties chargeable;

(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;

(4) the exclusion of merchandise from entry or delivery under any provision of the customs laws;

(5) the liquidation or reliquidation of an entry, or any modification thereof;

(6) the refusal to pay a claim for drawback; and

(7) the refusal to reliquidate an entry under section 1520(c) of this title,

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Customs Court in accordance with section 2632 of title 28 within the time prescribed by section 2631 of that title . . ." * * *

(b)(1) A protest of a decision under subsection (a) of this section shall be filed in writing with the appropriate customs officer designated in regulations prescribed by the Secretary, setting forth distinctly and specifically each decision described in subsection (a) of this section as to which protest is made; each

category of merchandise affected by each such decision as to which protest is made; and the nature of each objection and reasons therefor. Only one protest may be filed for each entry of merchandise, except that where the entry covers merchandise of different categories, a separate protest may be filed for each category. In addition, separate protests filed by different authorized persons with respect to any one category of merchandise that is the subject of a protest are deemed to be part of a single protest . . ." * * * Except as otherwise provided in section 1557 (b) of this title, protests may be filed by the importer, consignee, or any authorized agent of the person paying any charge or exaction, or filing any claim for drawback, or seeking entry or delivery, with respect to merchandise which is the subject of a decision in subsection (a) of this section.

(2) A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with such customs officer within ninety days after but not before—

(A) notice of liquidation or reliquidation, or

(B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made."

Section 516 of the Tariff Act of 1930, as amended by § 209 of the Act of June 2, 1970, Pub. L. 91-271, 84 Stat. 286, and §§ 321(f) and 331(b) of the Act of January 3, 1975, Pub. L. 93-618, 88 Stat. 2048, 2052, 19 U.S.C. § 1516:

"(a) The Secretary shall, upon written request by an American manufacturer, producer, or wholesaler, furnish the classification, the rate of duty, the additional duty described in section 1303 of this title (hereinafter in this section referred to as 'countervailing duties'), if any, and the special duty described in section 161 of this title (hereinafter in this

section referred to as 'antidumping duties'), if any, imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by him. If such manufacturer, producer, or wholesaler believes that the appraised value is too low, that the classification is not correct, that the proper rate of duty is not being assessed, or that countervailing duties or antidumping duties should be assessed, he may file a petition with the Secretary setting forth (1) a description of the merchandise, (2) the appraised value, the classification, or the rate or rates of duty that he believes proper, and (3) the reasons for his belief including, in appropriate instances, the reasons for his belief that countervailing duties or antidumping duties should be assessed. * * *

(c) If the Secretary decides that the appraised value or classification of the articles or the rate of duty with respect to which a petition was filed pursuant to subsection (a) of this section is correct, or that countervailing duties or antidumping duties should not be assessed, he shall so inform the petitioner. If dissatisfied with the decision of the Secretary, the petitioner may file with the Secretary, not later than thirty days after the date of the decision, notice that he desires to contest the appraised value or classification of, or rate of duty assessed upon or the failure to assess countervailing duties or antidumping duties upon, the merchandise. Upon receipt of notice from the petitioner, the Secretary shall cause publication to be made of his decision as to the proper appraised value or classification or rate of duty or that countervailing duties or antidumping duties should not be assessed and of the petitioner's desire to contest, and shall thereafter furnish the petitioner with such information as to the entries and consignees of such merchandise, entered after the publication of the decision of the Secretary at such ports of entry designated by the

petitioner in his notice of desire to contest, as will enable the petitioner to contest the appraised value or classification of, or rate of duty imposed upon or failure to assess countervailing duties or antidumping duties upon, such merchandise in the liquidation of one such entry at such port. The Secretary shall direct the appropriate Customs officer at such ports to notify the petitioner by mail immediately when the first of such entries is liquidated.

(d) Within 30 days after a determination by the Secretary—

(1) under section 160 of this title, that a class or kind of foreign merchandise is not being, nor likely to be sold in the United States at less than its fair value, or

(2) under section 1303 of this title that a bounty or grant is not being paid or bestowed, an American manufacturer, producer, or wholesaler of merchandise of the same class or kind as that described in such determination may file with the Secretary a written notice of a desire to contest such determination. Upon receipt of such notice the Secretary shall cause publication to be made thereof and of such manufacturer's, producer's, or wholesaler's desire to contest the determination. Within 30 days after such publication, such manufacturer, producer, or wholesaler may commence an action in the United States Customs Court contesting such determination."

STATEMENT

A. Introduction

On June 27, 1974, Petitioner Consumers Union [1] filed an action for declaratory and injunctive relief in the U.S. District Court for the District of Columbia, seeking to prevent the Committee for the Implementation of Textile Agreements ("CITA") from acting to restrain textile imports without first making reasoned determinations that the restraints are necessary, in accordance with statutory requirements and minimum procedural safeguards.[2] CITA is an interagency committee established by Executive Order 11651,[3] under the authority

[1] Consumers Union is a non-profit membership organization chartered in 1936 in New York to provide information, education and counsel regarding consumer goods and services and the management of family income. Its income is derived primarily from the sale of its publications, including its monthly magazine, *Consumer Reports*, which has a paid circulation in excess of 2.2 million readers. Consumers Union conducts regular product tests on textiles and textile products, purchasing approximately $15,000 worth of such products, which are or may be subject to quantitative import limitations, each year. Consumers Union brought the suit on its behalf and on behalf of its members, who are purchasers and consumers of textiles and textile products which are or may be subject to quantitative import limitations. Consumers Union has challenged the administration of trade laws several times in the past. *See, e.g.*, *Consumers Union of U.S., Inc.* v. *Rogers*, 352 F. Supp. 1319 (D.D.C. 1973), *modified sub nom. Consumers Union of U.S., Inc.* v. *Kissinger*, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied* 421 U.S. 1004 (1975); *Consumers Union of U.S., Inc.* v. *Butz*, No. 2142-72 (D.D.C. September 6, 1973).

[2] Individual respondents are members of CITA. The present chairman of CITA is Robert E. Shepherd, Deputy Assistant Secretary for Resources and Trade Assistance, U.S. Department of Commerce. Designated members from other agencies are John J. St. John, Chief, Textiles Division, U.S. Department of State; William E. Barreda, Deputy Director, Office of International Trade, U.S. Department of the Treasury; and Herbert Blackman, Associate Deputy Under Secretary for International Affairs, U.S. Department of Labor.

[3] 37 *Fed. Reg.* 4699 (1972), as amended by Executive Order 11951, 42 *Fed. Reg.* 1453 (1977).

of Section 204 of the Agricultural Act of 1956, to supervise the textile import quota program.

The program challenged by Petitioner involves CITA's negotiation and establishment of quotas, both through bilateral "voluntary restraint agreements" and through unilateral actions, restricting the importation of foreign textiles and textile products into the United States. The undisputed evidence introduced by Petitioner in the District Court demonstrated that textile import quotas raise prices of both imported and domestic goods and limit the range of consumer choices. The total cost to consumers of the textile quota program may exceed several billion dollars per year.

Petitioner does not claim that CITA has no authority under Section 204 to negotiate and impose import restrictions on textiles. Rather, its claim is that CITA may not impose such restrictions unless it first makes determination of actual or potential domestic market disruption, in accordance with the implicit standards of Section 204 and the basic procedural requirements of the Administrative Procedure Act ("APA"), Act of June 11, 1946, 60 Stat. 238, as amended, 5 U.S.C. §§ 552-553. The record in the case below reveals that CITA has never made such a reasoned determination that particular textile restraints are authorized by and consistent with Section 204.

B. The Statutory Scheme Governing Import Limitations and Its Implementation

The Constitution vests authority to regulate commerce with foreign nations in the Congress.[4] In Section 204 of the Agricultural Act of 1956, Congress delegated to the President the authority to negotiate agreements with foreign governments limiting the importation into the

[4] U.S. CONST. ART. I, § 8, Cl. 3.

United States of agricultural commodities, textiles and textile products. In turn, the President made a delegation to CITA of Section 204 authority regarding textiles in Executive Order 11651.[5] The purpose and legislative history of Section 204 indicate that its provisions are to be used only when necessary to protect the domestic market from disruption or injury from imports.

This standard was articulated expressly in the first multilateral textile agreement negotiated under CITA's authority—the multifibre Arrangement Regarding International Trade in Textiles ("Arrangement")—which creates a framework under which restraints may be imposed.[6] Article 3 authorizes unilateral restraints on the importation of products causing "market disruption". Article 4 authorizes bilateral restraints in order "to eliminate real risks of market disruption . . . and . . . to ensure the expansion and orderly development of trade in textiles. . . ." The Arrangement had the effect of requiring the United States to terminate all existing unilateral limitations and bilateral agreements,

[5] Section 1.(c) of the Executive Order, as amended by Executive Order No. 11951, now provides:

> "To the extent authorized by the President and by such officials as the President may from time to time designate, the Committee shall take appropriate actions concerning textiles and textile products under Section 204 of the Agricultural Act of 1956, as amended, and articles 3 and 8 of the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, and with respect to any other matter affecting trade policy."

It is noted here that the Executive Order contains no express delegation of authority with respect to *bilateral* textile import restraints under Article 4 of the Arrangement.

[6] Done December 20, 1973, 25 U.S.T. 1001, T.I.A.S. No. 7840. The Arrangement, sometimes called the "Multifibre Arrangement" or MFA, became effective on January 1, 1974. The United States entered into the Arrangement under the authority of Section 204.

or to bring them into conformity with the terms of the Arrangement, by March 31, 1975.[7]

In April 1974, CITA announced its intention to hold the required discussions with those countries with which the United States had existing bilateral textile agreements, and promulgated certain procedures to be followed in connection with the imposition of restraints.[8] Those procedures do not require any public determination that imposition of unilateral restraints is appropriate because of actual market disruption, or that bilateral restraints are appropriate because of risks of market disruption. Subsequently, CITA has taken final action to implement various quota agreements and to impose restraints without making a determination that such actions comply with the standards implicit in Section 204 of the Agricultural Act and without explaining the basis for its actions.

The purpose of the agreements entered into under this scheme is to control the export of textiles to the United States at their sources—in the countries of export.[9] The bilateral agreements take the form of so-called "voluntary" undertakings by exporting countries to limit the volume of their textile and apparel exports

[7] Article 2, paragraphs 2 and 3; Article 14, paragraph 2.

[8] 39 *Fed. Reg.* 13307 (1974).

[9] For example, the agreement between Japan and the United States, effected by an Exchange of Notes on September 27, 1974, provides that "Japan will conduct her exports to the United States of cotton, wool and man-made fiber textile products to see to it that an aggregate annual increase in exports of such products will not be in excess of the levels provided for in this Arrangement". The proposed 1978 agreement with Hong Kong relating to trade in cotton, wool and man-made fiber textiles and textile products refers in paragraph 9 to "the well established and effective Hong Kong system of export authorization and licensing." Exchange of Notes, August 8, 1977. *See also* the discussion of this point by the U.S. Court of Appeals for the Second Circuit in *Sneaker Circus, Inc. v. Carter*, No. 77-6092 (2d Cir. Nov. 10, 1977), infra, at App. 26a-28a.

to specified levels.[10] The U.S. Customs Service serves primarily as a monitoring agency with regard to the agreements.

C. The Decisions Below

The District Court, ruling on Respondents' motion for summary judgment, determined that the issues in the case were justiciable, that the Court had jurisdiction under 28 U.S.C. §§ 1331, 1337 and 1361, and that Petitioner had standing to maintain its suit. On the merits, however, the Court held that CITA did not have to make a determination of actual or potential market disruption before imposing restraints on textile imports, and found that CITA's actions under Section 204 were exempt from the requirements of the APA under the foreign affairs exception of the latter statute.

The Court of Appeals, without reaching the merits, ordered that the case be remanded and dismissed on the ground that exclusive jurisdiction lay in the Customs Court under 28 U.S.C. § 1582. The Court of Appeals apparently reasoned that the import limitations authorized by Section 204 are "a part of the customs law", and therefore exclusion of merchandise under the authority of that section is subject to protest by Petitioners under the Tariff Act of 1930, as amended, with denial of such protest being reviewable in the Customs Court.

Petitioner then requested that the Court of Appeals grant a rehearing, suggesting that the case be heard

[10] As one commentator has noted, "[t]he term 'voluntary' is justified only in the sense that the exporting country has the bitter choice between prohibiting some of its exports or seeing them prohibited by some protectionist measure of the importing country, such as a mandatory quota, a special duty, or even an embargo." I. Mintz, *U.S. Import Quotas: Costs and Consequences* (American Enterprise Institute Domestic Affairs Study 10, 1973) at 20.

en banc, on the grounds that the panel's decision conflicted with previous Court of Appeals decisions and that the Customs Court clearly did not have jurisdiction either to hear the case or to grant relief. The petition for rehearing was denied without opinion on September 2, 1977.

REASONS FOR GRANTING THE WRIT

This case presents a fundamental question of jurisdiction regarding a challenge to government action having a seriously detrimental impact on consumers, importers and others. Petitioner believes that the Customs Court's jurisdictional statutes and its published decisions establish clearly that it lacks jurisdiction either to hear this case or to grant Petitioner relief. Thus, if allowed to stand, the decision of the Court of Appeals below would preclude consumers and others from challenging in any court the legality of CITA's textile restraint program, and could prevent legal challenges to other, similar trade restraints as well.

On November 10, 1977, the United States Court of Appeals for the Second Circuit, in a case presenting identical jurisdictional questions, ruled that the Customs Court did not have jurisdiction over a challenge to restrictive footwear agreements negotiated pursuant to the Trade Act of 1974, Act of January 3, 1975, 88 Stat. 1978, 19 U.S.C. §§ 2101 *et seq.* It held that jurisdiction was appropriately in the District Court.[11] This conflict between the circuits requires the grant of certiorari in order to resolve the important jurisdictional questions raised, and to guide the lower courts in their handling of challenges to an increasingly common form of regulation of foreign commerce.

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[11] *See Sneaker Circus, Inc.* v. *Carter*, No. 77-6092 (2d Cir. November 10, 1977) (App. *infra* at 22a).

I. THE COURT OF APPEALS DECISION THAT THE CUSTOMS COURT HAS EXCLUSIVE JURISDICTION OVER THIS ACTION IS IN CONFLICT WITH THE JURISDICTIONAL STATUTE OF THE CUSTOMS COURT AND WITH THAT COURT'S REPORTED CASES AND IS CLEARLY ERRONEOUS.

A. The Customs Court Has Jurisdiction Only over Denials of Protests Regarding Duties and the Exclusion of Imports.

The basic jurisdictional statute of the Customs Court (28 U.S.C. § 1582) vests jurisdiction in that court solely to hear (1) challenges to the legality of administrative decisions denying a "protest pursuant to the Tariff Act of 1930" (Section 514), and (2) "actions brought by American manufacturers, producers or wholesalers pursuant to section 516 of the Tariff Act of 1930. . .":

> "(a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by *any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied*, in whole or in part, by the appropriate customs officer, *where the administrative decision*, including the legality of all orders and findings entering into the same, *involves*: . . . (4) *the exclusion of merchandise from entry or delivery* under any provisions of the customs laws . . . .
>
> "(b) The Customs Court shall have exclusive jurisdiction of civil actions brought by American manufacturers, producers, or wholesalers pursuant to section 516 of the Tariff Act of 1930, as amended.
>
> "(c) *The Customs Court shall not have jurisdiction of an action unless (1) either a protest has been filed*, as prescribed by section 514 of the Tariff Act of 1930, as amended, *and denied* in accordance with the provisions of Section 515 of the Tariff Act of 1930, as amended, or if the action relates to a de-

cision under section 516 of the Tariff Act of 1930, as amended, all remedies prescribed therein have been exhausted . . . ." (emphasis added).

The exclusivity of Customs Court jurisdiction in matters entrusted to it is reflected in 28 U.S.C. § 1340, which provides:

> "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court." [12]

Two provisions of the Tariff Act of 1930, as amended, establish the mechanisms giving access to the Customs Court. Section 514 provides for protests to be filed by an importer, consignee or agent seeking to challenge decisions imposing "charges or exactions" or seeking "entry or delivery" of merchandise, but the decisions challenged must "relate to specific existing entries of merchandise." [13] Section 516 permits an American "manufacturer, producer or wholesaler" to contest the appraisement, classification and assessment of duties on imported merchandise.

Both the Customs Court and the Court of Customs and Patent Appeals have been strict in insisting on resort to one of these mechanisms (under Section 514 or Section 516 of the Tariff Act of 1930) as a prerequisite to Customs Court jurisdiction. Their reported decisions

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[12] *See J.C. Penney Company* v. *United States Treasury Department*, 439 F.2d 63 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).

[13] *Micropoint, Inc.* v. *United States*, 426 F. Supp. 569, 570 (Cust. Ct. 1976). Customs Service regulations also reflect this: "Protests may be filed by the importer, consignee, or the person paying any charge or exaction, filing any claim for drawback or seeking entry or delivery with respect to merchandise which is the subject of the decision protested. . . ." 19 C.F.R. § 174.12(a).

make it clear that the Customs Court is a court of limited jurisdiction, established primarily to provide legal remedies to manufacturers, producers, wholesalers and importers who are injured by the customs treatment of foreign goods or by denial of entry of imported goods into the United States.[14]

B. Petitioner Does Not Qualify under the Statutory Scheme.

The Court of Appeals panel below apparently thought that the challenged restraint programs are part of United States customs law and therefore exclusion of merchandise under those programs would be subject to protest by Petitioner, with review in the Customs Court:

> "It can hardly be doubted that quantitative limitations on imports are a part of the customs law and that import laws directed at the protection of a particular industry are part and parcel of the same general body of law . . . [I]f anyone wishes to challenge the Committee's action, he can do so as other challenges of that nature are made, i.e. as an importer or as an American manufacturer, producer or wholesaler, bringing textiles into the United States. The provisions of 19 U.S.C. § 1514 then come into play. It provides that 'all decisions of the Collector . . . excluding any merchandise from entry or delivery under any provision of the custom laws . . .' are final unless the person aggrieved files a protest with the Collector. Upon its denial, he may

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[14] *See, e.g., United States* v. *Boe*, 543 F.2d 151 (C.C.P.A. 1976), *U.S.* v. *Hammond Lead Products, Inc.*, 440 F.2d 1024 (C.C.P.A.), *cert. denied*, 404 U.S. 1005 (1971); *Micropoint, Inc.* v. *United States*, 426 F. Supp. 569 (Cust. Ct. 1976); *Pasco Terminals, Inc.* v. *United States*, 416 F. Supp. 1242 (Cust. Ct. 1976); *see also Fritz* v. *United States*, 535 F.2d 1192, 1195 (9th Cir. 1976) ("if there is no compliance with the protest procedures of § 1514(b)(1), there is no jurisdiction in the Customs Court.").

> bring an action contesting the refusal to allow the merchandise to enter in the Customs Court. . . ." 561 F.2d at 874 (App. 20a-21a).

The panel held that the Customs Court has exclusive jurisdiction over Petitioner's complaint. But, as the Customs Court's statute and reported cases plainly show, the Customs Court can have no jurisdiction in this situation: under the challenged restraint programs, merchandise in excess of the quotas never comes to the United States; it is not excluded by the Customs Service; there can be no protest to that Service regarding merchandise on which it has never acted; and without such a protest no suit in the Customs Court is possible.[15]

Section 204 of the Agricultural Act of 1956—the provision challenged by Petitioner—is not part of the Tariff Act of 1930, nor is it a revenue act.[16] There is nothing in Section 204 that relates it in any way to the protest procedures provided in Section 514 of the Tariff Act of

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[15] Section 516 of the Tariff Act of 1930 has no relevance in the present case since Petitioner is not a manufacturer, producer or wholesaler and is not contesting any action of the Treasury regarding appraisement, classification, or assessment of duties on imported merchandise; there is no imported merchandise, in Petitioner's case, to be appraised, classified or assessed.

[16] Section 204 has no fee provisions at all. In this respect, Section 204 is unlike Section 22 of the Agricultural Adjustment Act of 1933, 7 U.S.C. § 624, which authorizes *both* imposition of fees (the fees are required to be considered part of the Tariff Act of 1930 by the terms of the statute) and quantitative import limitations. Under Section 22, the Customs Court has exercised jurisdiction to consider denial of a protest by an importer after the Customs Service had excluded merchandise on the ground that it was covered by limitations imposed under Section 22. *Western Dairy Products* v. *U.S.*, 373 F. Supp. 568 (Cust. Ct. 1974), *aff'd* 510 F.2d 376 (C.C.P.A. 1975). In a case where there had been no protest and no denial, a federal district court considered an importer's suit for preliminary injunction to require the collector of customs to permit entry of tung oil that was in excess of a quota established under Section 22. *Tennant, Sons & Co.* v. *Dill*, 158 F. Supp. 63 (S.D.N.Y. 1957).

1930. The quota arrangements challenged by Petitioner do not result in merchandise being denied entry into the United States. Under the quotas, goods in excess of a particular quantative limitation are never shipped to this country. Rather, a limit or "consultation point" is agreed upon for each of several categories of a commodity, and that quota is allocated internally and enforced by the exporting country.

Contrary to the view of the Court of Appeals, Petitioner and its members are challenging actions under a statute not covered by the Customs Court's grant of jurisdiction. Petitioner does not challenge a particular appraisal of value or exclusion from entry, but rather the actions of CITA in imposing quantitative restraints without reference to standards of judgment or procedural prerequisites in deciding upon those restraints. There is no possibility for Petitioner—or any other party, including importers—to challenge administrative actions under Section 204 by means of a protest pursuant to Section 514 of the Tariff Act of 1930.

The cases cited by the Court of Appeals panel are not apposite and do not support the conclusion that Customs Court jurisdiction is appropriate in this case. *Yoshida International, Inc.* v. *United States*, 378 F. Supp. 1155 (Cust. Ct. 1974), *rev'd on other grounds* 526 F.2d 560 (C.C.P.A. 1975), involved an importer's challenge to a surchage imposed by the Customs Service on imported merchandise when it was entered at the port of New York. *Western Dairy Products, Inc.* v. *United States*, 373 F. Supp. 568 (Cust. Ct. 1974), *aff'd* 510 F.2d 376 (C.C.P.A. 1975), involved a typical challenge in the Customs Court to denial by the Customs Service of plaintiff's protest over the exclusion of merchandise (because it fell into a category covered by limitations imposed under Section 22 of the Agricultural Adjustment Act of 1933).

C. The Customs Court Could Not Grant Petitioner Relief On Its Compaint.

The conclusion that the Customs Court lacks jurisdiction to hear challenges to quotas imposed pursuant to Section 204 is reinforced by the fact that the Customs Court would not be able to grant Petitioner relief on its claims. The Customs Court traditionally has taken the view that it lacks equity jurisdiction. For example, in *Cummins-Collins Distilleries* v. *United States*, 20 Cust. Ct. 93, 97, C.D. 1090 (1948), *aff'd* 36 C.C.P.A. 88, C.A.D. 403 (1949), the Customs Court held:

> "But it has long been held, however, that this court is a court of the United States *of limited and special jurisdiction and without equitable jurisdiction.*" (emphasis added).[17]

Consumers Union is seeking relief of an equitable nature—an injunction requiring Respondents to follow the provisions of Sections 3 and 4 of the APA, 5 U.S.C. §§ 552, 553, in making the determinations regarding the need for textile import quotas that are required by Section 204 and by Articles 3 and 4 of the Arrangement. Absent that injunctive relief, Consumers Union and its members suffer irreparable injury through the payment of higher prices for textiles and textile products and a reduction in purchasing choices.

II. THE COURT OF APPEALS DECISION THAT THE DISTRICT COURT DOES NOT HAVE JURISDICDICTION OVER THIS ACTION IS IN CONFLICT WITH PREVAILING CASE LAW AND DENIES PETITIONER A FORUM IN WHICH TO CHALLENGE ACTIONS UNDER SECTION 204.

As discussed above, Petitioner cannot maintain this action in the Customs Court, and that court could not grant

[17] *See also Carl Matusek Shipping Co.* v. *United States*, 51 Cust. Ct. 8, C.D. 2406 (1963); *Harry A. Liebler* v. *United States*, Abstract 20022, 61 Treas. Dec. 1633 (1932).

Petitioner relief on its claims. In such circumstances, federal courts have held consistently that the federal district court has jurisdiction to hear complaints that sometimes involve customs matters. Numerous challenges to the administration of trade laws have been heard in federal district courts.[18]

In *National Milk Producers Federation* v. *Shultz*, 372 F. Supp. 745 (D.D.C. 1974), milk producers brought an action to require the Secretary of Treasury to comply with the requirements of the countervailing duties section of the Tariff Act of 1930. The Court held that since Customs Court jurisdiction over such challenges was foreclosed,[19] the District Court has jurisdiction:

> "[T]he statutory grant of exclusive jurisdiction conferred upon the Customs Court by 28 U.S.C. § 1582 is inoperative as its activation requires a 'protest pursuant to the Tariff Act of 1930' which is unavailable to plaintiffs. Since § 1582 is the only statu-

[18] Normally, when restrictions on imports involve neither their valuation nor classification by the Customs Service, challenges to the restrictions proceed in a federal district court. Import restrictions under laws protecting American producers were challenged in federal district court in: *Holm & Co.* v. *Hardin*, 318 F. Supp. 521 (D.D.C. 1970), *modified* 449 F.2d 1009 (D.C. Cir. 1971) (challenging limitations on the size of imported tomatoes that were imposed in order to restrict the quantity of tomato imports); *Croton Watch Co.* v. *Laughlin*, 208 F.2d 93 (2d Cir. 1953) (challenging a finding by the collector of customs that watches to be imported would infringe a trademark); and *Consumers Union of U.S., Inc.* v. *Kissinger*, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied* 421 U.S. 1004 (1975) (challenging "voluntary" export restraint agreements concluded by the Executive Branch with individual foreign steel producers).

[19] The Court of Customs and Patent Appeals previously had ruled that Section 516 of the Tariff Act of 1930 did not authorize challenges by American manufacturers regarding countervailing import duties. *United States* v. *Hammond Lead Products, Inc.*, 440 F.2d 1024 (C.C.P.A.), *cert. denied* 404 U.S. 1005 (1971).

tory grant of jurisdiction to the Customs Court respecting review of import charges, *its unavailability acts to confer original jurisdiction upon this court* . . . ." 372 F. Supp. at 746 (emphasis added).

One panel of the Court of Appeals for the District of Columbia has stated the rule: "Where no adequate remedy exists in the Customs Court for actions concerning customs matters, the federal district courts have jurisdiction." *SCM Corp.* v. *United States International Trade Commission*, 549 F.2d 812, 815 (1977).[20] Such a rule is consistent with the principle articulated by Justice Brandeis:

> "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied and whether the proceeding in which facts were adjudicated was conducted regularly."[21]

Administrative decisions that fail to heed statutory standards or frustrate Congressional policy must be subject to judicial review.[22]

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[20] *Accord The Timken Co.* v. *Simon*, 539 F.2d 221, 226 n.7 (1976) ("Since Timken has no remedy pursuant to Section 516 in the Customs Court, we decline to hold that the District Court lacked jurisdiction over this action."); *see also Federal Energy Administration* v. *Algonquin SNG, Inc.*, 425 U.S. 548 (1976); *Consumers Union of U.S., Inc.* v. *Kissinger*, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied* 421 U.S. 1004 (1975).

[21] *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 84 (1936).

[22] *See, e.g., Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *United States* ex rel *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *Pillai* v. *Civil Aeronautics Board*, 485 F.2d 1018 (D.C. Cir. 1973); *Environmental Defense Fund, Inc.* v. *Hardin*, 428 F.2d 1093, 1100 (D.C. Cir. 1970); *American Airlines, Inc.* v. *Civil Aeronautics Board*, 348 F.2d 349 (D.C. Cir. 1965); *Imbert Imports, Inc.* v. *United States*, 314 F. Supp. 784 (Cust. Ct. 1970); *aff'd* 331 F. Supp. 1400 (Cust. Ct. 2d Div. App. Term 1971). *aff'd* 475 F.2d 1189 (C.C.P.A. 1973).

The Court of Appeals was clearly in error in finding that the District Court did not have jurisdiction to hear Petitioner's suit.[23]

III. THERE IS A DIRECT CONFLICT BETWEEN TWO CIRCUITS ON THE JURISDICTIONAL ISSUE RAISED.

In *Sneaker Circus, Inc.* v. *Carter*, No. 77-6092 (2d Cir. Nov. 10, 1977),[24] retailers, wholesalers and importers of footwear challenged trade agreements negotiated under the Trade Act of 1974, 19 U.S.C. § 2101 *et seq.*, with the Republic of Korea and the Republic of China to limit the quantity of footwear imported into the United States. While the defendants argued that the Customs Court had exclusive subject matter jurisdiction over the challenge, citing the District of Columbia Court of Appeals decision in *Consumers Union of U.S., Inc.* v. *CITA*, a unanimous panel held to the contrary. The panel reasoned that the plaintiffs could not file with the Customs Service any protest over the imposition of quotas since the agreements would be enforced abroad and the opportunity for protest would never arise. The Court relied upon two recent decisions of the Court of Appeals for the District of Columbia Circuit that sustained District Court jurisdiction in similar situations involving custom matters—*The Timken Co.* v. *Simon*, 539 F.2d 221 (D.C. Cir. 1976) and *Consumers Union of U.S., Inc.* v. *Kissinger*, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied* 421 U.S. 1004 (1975).

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[23] *See J.C. Penney Company* v. *United States Treasury Department*, 439 F.2d 63, 68 (2d Cir), *cert. denied*, 404 U.S. 869 (1971); *Argosy Ltd* v. *Hennigan*, 404 F.2d 14, 21 (5th Cir. 1968); *Cottman Co.* v. *Dailey*, 94 F.2d 85, 89 (4th Cir. 1938); *Horton* v. *Humphrey*, 146 F. Supp. 819, 821 (D.D.C.), *aff'd per curiam*, 352 U.S. 921 (1956).

[24] This is an unreported decision. It is included in the Appendix hereto at App. 22a.

Plaintiffs in *Sneaker Circus* sought the same type of declaratory and injunctive relief regarding so-called "voluntary" quantitative restrictions as does Petitioner in this case, on the ground that proper procedures had not been followed. Likewise, similar to the situation facing Petitioner, the Court in *Sneaker Circus* found that the "voluntary" agreements would be enforced abroad. The Court noted that, in some countries, violation of the export limits would subject the foreign exporter to civil and/or criminal sanctions. As a result:

> "[N]o occasion for protest . . . will ever present itself, and no Customs Court jurisdiction under 28 U.S.C. § 1514 will arise. The point is not that the dispute is not presently ripe for adjudication in the Customs Court, but rather that the case will never ripen sufficiently to meet the statutory requirements for jurisdiction. When this situation occurs, jurisdiction over a customs matter which presumptively inheres in the Customs Court reverts to the District Court under 28 U.S.C. §§ 1331 and 1337." App. 27a.

The decisions in *Sneaker Circus* and in the Court of Appeals below are in direct conflict regarding the jurisdiction of the Customs Court to hear the type of challenge made by Petitioner.

CONCLUSION

The decision below represents an erroneous interpretation of a basic jurisdictional statute and effectively precludes consumers and others, including importers, from obtaining judicial review of the administration of important United States trade laws. There is a direct conflict between the circuits as to jurisdiction over such challenges. For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

JAMES N. BARNES

LEONARD C. MEEKER

GEORGE C. DEPTULA

Center for Law and Social Policy
1751 N Street, N.W.
Washington, D.C. 20036
(202) 872-0670

Attorneys for Petitioner

MARK SILBERGELD
Consumers Union of United States
1714 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Of Counsel

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-968

[Filed—Oct. 20, 1975]

COSUMERS UNION OF THE UNITED STATES, INC.,
Plaintiff,

v.

COMMITTEE FOR THE IMPLEMENTATION OF
TEXTILE AGREEMENTS, ET AL.,
Defendants.

MEMORANDUM

This matter is before the Court on defendants' motion for judgment on the pleadings or in the alternative for summary judgment, plaintiff's motion for partial summary judgment, and oppositions thereto. Jurisdiction is vested in this Court under 28 U.S.C. §§ 1331, 1337, and 1361.[1]

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[1] Defendants challenge this Court's jurisdiction, relying on the provisions of 28 U.S.C. § 1582(a), which sets forth the exclusive jurisdiction of the Customs Court. In setting forth the general jurisdiction of that Court, the section specifies the bases on which protests may be maintained. They are as follows: appraisals of the value of merchandise, the classification rate and amount of duties chargeable, charges of whatever character within the jurisdiction of the Secretary of the Treasury, exclusion from entry of merchandise, liquidations of an entry or a modification thereof, refusal to pay a claim or a drawback or refusal to re-liquidate an entry under Section 520(c) of the Tariff Act of 1930. This litigation, however, challenges the authority of the President of the United States to enter into voluntary agreements with foreign nations, the effect of which is to limit their exports to the United States. In a recent case involving, under similar circumstances, executive action concerning the importation of steel from Japan and Europe, neither this Court

I.

Section 204 of the Agricultural Act of 1956, as amended,[2] provides that

> The President may, whenever he determines such action appropriate, negotiate with representatives of foreign governments in an effort to obtain agreements limiting the export from such countries and the importation into the United States of any agricultural commodity or product manufactured therefrom or textiles or textile products. . . .

This authority has been delegated in its entirety by an Executive Order [3] to the Committee for the Implementation of Textile Agreements (hereinafter, "the Commission"). This is an interdepartmental committee consisting of representatives from the Departments of State, the Treasury, Commerce, and Labor.

Acting under the authority of the Act, the United States entered into the Arrangement Regarding International Trade in Textiles (hereinafter, "the Arrangement").[4] This is a multilateral, international agreement which became effective January 1, 1974. A basic objective is

> to achieve the expansion of trade, the reduction of barriers to such trade and the progressive liberalization of world trade in textile products, while at the same time ensuring the orderly and equitable development of this trade and avoidance of disruptive effects in individual markets and on individual lines

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nor the Court of Appeals had any difficulty with the jurisdictional issue. See *Consumers Union of U.S., Inc.* v. *Kissinger*, —— U.S. App.D.C. ——, 506 F.2d 136 (1974).

[2] 7 U.S.C. § 1854. The Act was amended in 1962.

[3] Executive Order 11651, 3A C.F.R. 152 (Comp. 1972).

[4] 39 Fed. Reg. 13308 (April 12, 1974).

> of production in both importing and exporting countries.[5]

The Arrangement itself does not establish restraints on the importation of textiles, nor does it require the imposition of restraining. Rather it provides a framework under which restraints may be imposed.

Under the Arrangement, restraints can be established in one of two ways. Pursuant to Article 3, participating countries are authorized to restrain *unilaterally* by use of quantitative limitations the importation of textiles and textile products which are causing "market disruption" and concerning which the involved importing and exporting countries are unable to reach agreement through consultation.[6]

Pursuant to Article 4, paragraph 2, of the Arrangement, participating countries are authorized to restrain by the use of quantitative limitations agreed upon *bilaterally* the importation of textiles and textile products

> in order, on the one hand, to eliminate real risks of market disruption . . . in importing countries and disruption to the textile trade of exporting countries, and on the other hand to ensure the expansion and orderly development of trade in textiles and the equitable treatment of participating countries.[7]

Under the Arrangement, all existing unilateral quantitative limitations and all existing bilateral agreements must either have been terminated or brought into conformity with the provisions of the Arrangement by March

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[5] Article 1, paragraph 2.

[6] Such unilateral action under the Arrangement was undertaken by the United States against Haiti. 40 Fed. Reg. 8850 (March 3, 1975).

[7] Article 4, paragraph 2.

31, 1975.[8] Therefore in the Spring of 1974, the United States began to assess existing restraints. In a series of Notices in the Federal Register between April and September, 1974,[9] the Committee announced that bilateral discussions were to take place with twelve different exporting countries and invited comments.

As a result of these discussions, quantitative limitations have been imposed on the amount of textiles and textile products which may be shipped into the United States from such countries as Hong Kong, Japan, and India. Plaintiff emphasizes that these restraints have been imposed without any published determination that textile imports from the countries in question have caused "market disruption" or that restraints on such imports are needed "to eliminate real risks of market disruption."

II.

Plaintiff[10] brought this suit to compel defendants to make reasoned determinations with regard to the need

[8] Article 2, paragraphs 2 and 3; Article 14, paragraph 2.

[9] *See* 39 Fed. Reg. 13709 (April 16, 1974) (Mexico, Hong Kong, Pakistan, Thailand); 39 Fed. Reg. 21067 (June 18, 1974) (Pakistan, China, Japan, Malaysia, Korea); 39 Fed. Reg. 27602 (July 30, 1974) (Romania, Portugal, Macao); 39 Fed. Reg. 32574 (September 9, 1974) (Colombia); and 39 Fed. Reg. 32829 (September 11, 1974) (Haiti).

[10] Plaintiff Consumers Union of the United States, Inc., is a nonprofit organization chartered in 1936 under the laws of the State of New York. Its purpose is to provide information, education, and counsel about consumer goods and services, and the management of family income. Plaintiff's income is derived almost exclusively from the sale of its monthly magazine, *Consumer Reports*, which currently has a paid circulation in excess of 2.2 million readers. This and other of plaintiff's publications contain, *inter alia*, reports on Consumers Union's own product testing. Plaintiff alleges that it annually purchases, for testing and other purposes, in excess of $15,000 worth of textiles and textile products. These products are or may be subject to quantitative import limitations. Thus plaintiff has standing to sue.

to impose restraints on imports of textiles and textile products, and to adhere to certain minimum procedural safeguards in establishing the basis for imposing restraints.

More specifically, plaintiff claims that in deciding to impose restraints, whether by unilateral action or bilateral agreement, the defendants have violated Section 204 of the Agricultural Act of 1956 by failing to make determinations that imports from the countries in question have caused "market disruption" or that such restraints are needed "to eliminate real risks of market disruption." Additionally, plaintiff charges that defendants have failed to follow the procedures of Sections 3 and 4 of the Administrative Procedure Act[11] in deciding to impose restraints and taking implementing actions to impose such restraints.

Plaintiff seeks a declaratory judgment that the failure of defendants to make appropriate determinations of the need for textile import restraints has violated both the Agricultural Act of 1956 and the Administrative Procedure Act. Plaintiff also seeks a mandatory injunction requiring that such determinations be made prior to making decisions and taking implementing actions to impose such restraints.

Defendants have moved for judgment on the pleadings, contending that this action should be dismissed because the Executive's discretionary power to conduct foreign affairs is judicially non-reviewable.[12] In the alternative defendants have moved for summary judgment,

[11] 5 U.S.C. §§ 552 and 553.

[12] The fact that Section 204 involves the Congressional function of regulating commerce with foreign nations as well as the Executive function of negotiating with representatives of foreign governments precludes characterizing this Act as solely a matter of foreign affairs. Hence defendants' motion for judgment on the pleadings will be denied.

contending that the President under the Act, and hence the Committee under the Executive Order, have discretion to negotiate import restrictions on textiles, and that the APA does not apply to "foreign affairs functions" such as these. Plaintiff has filed a cross-motion for partial summary judgment, alleging that the Committee's actions violate the APA.[13] For reasons stated below, the Court grants defendants' motion for summary judgment.

III.

Plaintiff's position is as follows. The Constitution vests authority to regulate commerce with foreign nations in the Congress.[14] Congress may delegate its authority to the Executive.[15] But if it does so, it must prescribe standards to delineate the scope of the President's discretion.[16] It cannot issue a *carte blanche*. Whenever an Act—like Section 204 of the Agricultural Act of 1956—does not explicitly prescribe standards, it is

[13] Plaintiff has moved for summary judgment on Count II only (violation of the APA) because it is undisputed that defendants have not *published* any determinations with respect to actual or potential domestic market disruption prior to the imposition of restraints.

[14] Article I, § 8, Cl. of the United States Constitution.

[15] In *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940), the Court said, "Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility." At 398.

[16] "A constitutional delegation of powers requires that Congress enunciate a policy or objective or give reasons for seeking the aid of the President . . . . And because Congress cannot abdicate its legislative function and confer carte blanche authority on the President, it must circumscribe that power in some matter. This means that Congress must tell the President what he can do by prescribing a standard which confines his discretion and which will guarantee that any authorized action he takes will tend to promote rather than flout the legislative purpose."

Star-Kist Foods, Inc. v. *United States*, 275 F.2d 472, 480 (C.C.P.A. 1959).

appropriate for the Court to examine the purpose, background, and context of the Act to determine whether an "intelligible principle" exists to which the President must conform.[17] The existence of such an intelligible principle will save the Act from being an unlawful delegation of authority because it will provide boundaries for the President's action.

According to plaintiff, the purpose, background, and context of Section 204 reveal that it has an intelligible principle, namely, the protection of the domestic market against disruption or injury from imports of foreign textiles and textile products. Therefore, plaintiff contends, defendants should make a determination that textile imports have caused market disruption in the United States or that restraints are needed to eliminate real risks of market disruption before imposing such restraints. Furthermore, under the APA, this determination should be published.

Defendants reply that the Agricultural Act of 1956 clearly provides the President with "unfettered discretion" to initiate and conclude agreements imposing import restraints on textiles "whenever he determines such action appropriate." The legislative history discloses that the purpose of Section 204 was to free international textile agreements from the elaborate procedural requirements of Section 22 of the Agricultural Adjustment Act of 1933.[18] If Section 204 is characterized as a delegation of authority from Congress to the President, it is a valid delegation because the authority delegated overlaps the President's inherent authority over foreign affairs, and delegations which involve foreign affairs

[17] *Yakus* v. *United States*, 321 U.S. 414, 424 (1944); *Star-Kist Foods, Inc.* v. *United States*, *supra*, 275 F.2d at 480.

[18] These procedures are set forth in the dissenting opinion, *Consumers Union of U.S., Inc.* v. *Kissinger*, 506 F.2d at 153.

may be broad in scope.[19] But, say defendants, this is not a delegation of authority. Rather it is a recognition by Congress of the President's concurrent authority over foreign commerce as an aspect of foreign affairs. Either way, however, there is no requirement that the President make a specific determination of actual or potential market disruption before negotiating agreements under Section 204. Market disruption is but one of many factors which the President may consider.

Thus, in a nutshell, plaintiff contends that Section 204 is an unlawful delegation of authority from Congress to the President unless the President's authority is constrained by the necessity of finding actual or potential domestic market disruption before imposing restraints. Defendants contend that this is a valid delegation [20] without such constraint because the authority delegated involves foreign affairs.

IV.

It is axiomatic that a statute should be construed, whenever possible, to uphold its constitutionality.[21] Furthermore, delegations of authority from Congress to the President which involve foreign affairs may be much broader than those which deal only with domestic matters.[22] Of course, not every statute that deals however

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[19] See cases cited in footnote 22.

[20] Of course defendants also contend that no delegation is required since the President possesses concurrent authority over foreign commerce. But the Court has rejected this argument inso far as it pertains to Section 204. See footnote 12.

[21] *United States* v. *Vuitch*, 402 U.S. 62 (1971).

[22] *United States* v. *Curtiss-Wright Export Company*, 299 U.S. 304 (1936); *Zemel* v. *Rusk*, 381 U.S. 1 (1965); *South Puerto Rico Sugar Co. Trading Corp.* v. *United States*, 334 F.2d 622 (Ct. Cl. 1964); *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO* v. *Connally*, 337 F. Supp. 737 (D.D.C. 1971).

remotely with foreign relations may qualify for such broad delegation.[23] It is necessary to determine whether the delegation involves the President's foreign affairs authority.

Section 204 deals with the regulation of one aspect of foreign commerce. The regulation of commerce with foreign nations is a power vested in the Congress by the Constitution.[24] Section 204 delegates this authority to the President.

However the significant factor in this delegation is that the President is not authorized to act alone in establishing import restrictions. Rather he is authorized "to negotiate with representatives of foreign governments" concerning textile trade agreements. Thus Section 204 on its face involves the President in his foreign affairs function of negotiating with other nations.[25] In so doing he must consider many factors, only one of which may be potential or actual domestic market disruption.[26] In this kind of situation it is lawful for the Congress to make such a broad delegation of authority as is found in Section 204. As the Supreme Court said in *United States* v. *Curtiss-Wright Export Company*,

> If, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effec-

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[23] *Zemel* v. *Rusk*, *supra*, 381 U.S. at 17.

[24] Article I, § 8, Cl. 3 of the United States Constitution.

[25] Article II, § 1, Cl. 1 and § 2, Cl. 1 of the United States Constitution.

[26] According to W. Patrick Morris, Office of General Counsel, United States Department of Commerce, noneconomic factors of a foreign relations nature will often be of significance in the negotiations. 5 LAW & POLICY IN INTERNATIONAL BUSINESS 493, 683, n. 1234 (1973).

> tive through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.[27]

Recently, District Judge Gordon Thompson, Jr., upheld the constitutionality of the Tuna Conventions Act of 1950 [28] and The Convention for the Establishment of an Inter-American Tropical Tuna Commission [29] in the face of a charge of an invalid delegation of legislative authority to the President.[30] In so doing the Court stated that

> when considering a delegation of authority to engage in international negotiations, only the most clear abuse or true congressional abdication or a violation of individual constitutional rights should

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[27] 299 U.S. at 320. More recently the Court of Claims noted that

> In the external sector of the national life, Congress does not ordinarily bind the President's hands so tightly that he cannot respond promptly to changing conditions or the fluctuating demands of foreign policy. Accordingly, when Congress uses far-reaching words in delegating authority to the President in the area of foreign relations, courts must assume, unless there is a specific contrary showing elsewhere in the statute or in the legislative history, that the legislators contemplate that the President may and will make full use of that power in any manner not inconsistent with the provisions or purposes of the Act. In a statute dealing with foreign affairs, a grant to the President which is expansive to the reader's eye should be hemmed in or "cabined, cribbed, confined" by anxious judicial blinders.

South Puerto Rico Sugar Co. Trading Corp. v. *United States, supra,* 334 F.2d at 632.

[28] 16 U.S.C. § 951 *et seq.* (1974).

[29] September 1, 1949, 1 U.S.T. 230, T.I.A.S. No. 2044.

[30] *United States* v. *Approximately 633.79 T. Yellow Tuna,* 383 F. Supp. 659 (S.D. Calif. 1974).

> lead to the invalidation of the legislation by the courts.[31]

Viewed in the light of this re-statement of the law of delegation of authority involving foreign affairs [32] Section 204 of the Agricultural Act of 1956 is clearly valid. Nor is the Executive required to make a determination of actual or potential domestic market disruption before imposing import restraints on textiles. For there is no showing of abdication of authority by the Congress or abuse of delegated authority by the President.[33]

V.

In *Consumers Union of U.S., Inc.* v. *Kissinger, supra,* a comparable issue was before our Court of Appeals. There the product concerned was steel; here, the product is textiles. There, as here, it was contended that the Executive lacks authority to enter into agreements with foreign producers of textiles whereby those foreign nations voluntarily reduced their exports to this country. The holding of the Court of Appeals was

> that the District Court did not err in declining to characterize the conduct of the Executive here under attack as in conflict with the Trade Expansion Act of 1962 . . . .

506 F.2d at 144.

And finally the Court held that ". . . the defendants were not precluded from following the course they did by anything in the Constitution or Title 19 of the U.S. Code." *Id.*

Significantly in his dissent, Judge Leventhal, at page 156, mentions

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[31] 383 F. Supp. at 661-2.

[32] 299 U.S. 304, 320.

[33] Individual constitutional rights are not involved in this suit.

> The only exception—in 7 U.S.C. § 1854 which permits the President to negotiate import restrictions on textiles and agricultural products without mandatory procedural prerequisites—proves the rule.[34]

Thus, although Judge Leventhal dissented from the majority composed of Judges McGowan and Danaher which specifically approved in *Consumers Union of U.S., Inc.* v. *Kissinger*, *supra*, of informal negotiations under Executive authority and delegated congressional authority whereby steel exporting countries voluntarily limited their products which were imported into the United States, Judge Leventhal's dissent, which emphasized the procedural steps necessary to validate such limitations, recognized the exception in the case of textiles imported into the United States.

The "friendly negotiations" and informal procedures contemplated under Section 204 replaced more formal factfinding steps which included notice and opportunity to be heard to interested parties. In 1962 Section 204 was amended to make it applicable to multilateral agreements as well as bilateral agreements. Congress was well aware of the wide discretion it had conferred upon the President. Thus Senator Cotton, in discussing the proposed amendment, said:

> The bill, by confirming the existing law broadening its provisions, strengthens the power of the President to negotiate with foreign countries in an effort to obtain agreements limiting the importation into the United States of any agricultural commodity or textile product. In this respect, the President is not bound by the chains of law. He is free to enter into any agreement he wished, and under the bill

[34] Reference to 7 U.S.C. § 1854 discloses that it also may be referred to as Section 204, 70 Stat. 200, the Act of June 19, 1962, Pub. L. 87-488, 76 Stat. 104.

> can enforce it against all other nations. He is not bound by legally established guidelines, or legislative restraints. His power is unbridled.

108 Cong. Rec. 8522 (1962).

Thus it is clear that what plaintiff here challenges was intended by Congress as a delegation of its authority over commerce to the Executive in this particular instance and recently such action has the approval of our Court of Appeals.

VI.

There is no showing of abuse by the President of the authority delegated to him by the Congress in Section 204. The President, through the Committee, has entered into the Arrangement under the authority of Section 204 to accomplish a variety of purposes not only for this nation but also for other nations. The goal is harmony in international commercial relations. As noted *infra*, a basic objective of the Arrangement is

> to achieve the expansion of trade, the reduction of barriers to such trade and the progressive liberalization of world trade in textile products, while at the same time ensuring the orderly and equitable development of this trade and avoidance of disruptive effects in individual markets and on individual lines of production in both importing and exporting countries.[35]

Furthermore, the Committee has published Notices in the Federal Register announcing bilateral discussions which were to take place with different exporting countries and invited comments. To this extent nothing was done in secret.

The Committee also announced its intention of publishing in the Federal Register "insofar as practicable

[35] Article 1, paragraph 2.

consistent with the requirements of consultations with foreign governments" "evidence of market disruption which has caused the United States to request consultations." [36] This, however, is a goal of the Committee, not a requirement of the Act.

Equally important is the fact that under the Arrangement there are two separate international bodies, the Textile Surveillance Body and the Textile Committee to supervise the implementation of the Agreement.[37] In *Scherk* v. *Alberto-Culver Company* [38] the Supreme Court noted the impropriety and potentially unsettling effects on international trade of the courts of one country asserting jurisdiction over a matter which had been assigned to international arbitration.

The Committee has used its authority under the Arrangement to act unilaterally in imposing import restraints only once.[39] But that decision, too, is subject to examination by the Textile Surveillance Body and the Textile Committee.

Finally, the fact that Congress amended the Act in 1962 to broaden its scope to include multilateral negotiations indicates to the Court that the Congress was satisfied that the President had not abused the authority delegated to him.

Thus the Court concludes that Section 204 involves not only foreign commerce, which is the responsibility of the Congress, but also foreign affairs, which is the prerogative of the President. Because of such foreign affairs involvement, Section 204 is a valid delegation of authority

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[36] 39 Fed. Reg. 13307-8.

[37] Article 10 and Article 11.

[38] 417 U.S. 506 (1974).

[39] See footnote 6 *supra*.

on its face. The President's discretion need not be limited by requiring him to make specific determinations of potential or actual domestic market disruption before he imposes restraints.

VII.

This conclusion that Section 204 is intricately involved in foreign affairs as well as foreign commerce removes the Act from the requirements of the APA. For Section 4 of the APA, in prescribing procedures to be followed by Federal agencies in performing their rulemaking functions, specifically excepts from those requirements any "foreign affairs function" of the United States.[40] The Committee has always deemed its activities to fall under that exemption.[41] And this Court agrees that Executive actions taken pursuant to Section 204 come under the foreign affairs exception to the APA. Defendants' motion for summary judgment is granted.

/s/ Oliver Gasch
Judge

October 16/75

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[40] 5 U.S.C. § 553(a)(1).

[41] In inviting comments on proposed discussions with other nations, the Committee stated as follows:

> The solicitation of comments on any negotiation, consultation, market disruption or any other matter pursuant to this notice is not a waiver in any respect of the exemption contained in 5 U.S.C. sec 553(a)(1) and 554(a)(4) of the Administrative Procedure Act relating to matters which constitute "a foreign affairs function of the United States."

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1064

CONSUMERS UNION OF UNITED STATES, INC.,
INDIVIDUALLY AND ON BEHALF OF ITS MEMBERS,
Appellant

v.

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS, c/o SETH M. BODNER, CHAIRMAN, U. S. DEPARTMENT OF COMMERCE, ET AL.

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil 74-968)

Argued January 26, 1977

Decided April 20, 1977

Eldon V. C. Greenberg, with whom *Richard A. Frank* was on the brief, for appellant.

David M. Cohen, Attorney, Department of Justice for appellees. *Rex E. Lee*, Assistant Attorney General and *Andrew P. Vance*, Chief Customs Section Department of Justice at the time the brief was filed were on the brief for appellees.

Before MR. JUSTICE CLARK,* *of the Supreme Court of the United States*, and MACKINNON and ROBB, *Circuit Judges.*

Opinion for the court *Per Curiam.*

PER CURIAM: Consumers Union of United States, Inc. (Consumers Union) filed this complaint for declaratory judgment and mandatory injunction against the Committee for the Implementation of Textile Agreements (The Committee), and its four members, the Deputy Assistant Secretary of Commerce for Resources and Trade Assistance, the Deputy Director of the Office of Trade Policy of the Department of Treasury, the Associate Deputy Undersecretary of Labor for Trade and Adjustment Policy and the Assistant Chief, Fibers and Textiles Division of the Department of State. Consumers Union sought a declaratory judgment and mandatory injunction against the administration of the United States program regulating by quota the importation of textiles and textile products into the United States, as authorized by Section 204 of the Agricultural Act of 1956, as amended, 7 U.S.C. § 1854.[1]

1. *The Parties and Their Claims:*

Consumers Union is a non-profit membership organization which provides information, education and counsel

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* Mr. Justice Tom C. Clark, United States Supreme Court, Retired, sitting by designation pursuant to 28 U.S.C. § 294(a).

[1] It provides:

The President may, whenever he determines such action appropriate, negotiate with representatives of foreign governments in an effort to obtain agreements limiting the export from such countries and the importation into the United States of any agricultural commodity or product manufactured therefrom or textiles or textile products, and the President is authorized to issue regulations governing the entry or withdrawal from warehouse of any such commodity, product, textiles, or textile products to carry out any such agreement.

about consumer goods and services and other matters affecting consumer welfare. It annually purchases in excess of $15,000 worth of textile products for testing and other purposes. It brought this suit on its own behalf, as well as that of its members who are also purchasers and consumers of textiles and textile products. The Committee has been delegated full authority under Executive Order 11651 to supervise the implementation of the textile import quota program, including the setting of quotas, if any, on textile imports. Consumers Union alleges that the Committee, contrary to the requirements of Section 204, has failed to make determinations that imports from the countries in question have caused "market disruption" or that such restraints are needed "to eliminate real risks of market disruption", which is the purpose of the Act, and that, in addition, the Committee has failed to honor the requirements of Sections 3 and 4 of the Administrative Procedure Act, 5 U.S.C. §§ 552 and 553, in making its decisions.

The Committee contends that (1) Consumers Union has no standing to maintain its claim; (2) the matters complained of are within the exclusive competence of the Customs Court, and the District Court, therefore, had no jurisdiction; (3) judicial review of the Committee action is barred by the doctrine of separation of power; (4) the Committee was not required to follow the requirements of the Administrative Procedure Act; and finally, (5) the Committee enjoyed broad powers of discretion in implementing Section 204 and was not obliged to determine, before taking action, that the purposes of the Act were met.

2. *The Action of the District Court:*

The District Court granted the Commission's motion for summary judgment; found that the Court had jurisdiction and that Consumers Union had standing; however, it held that Section 204 came under the foreign affairs exception to the APA; and, finally, that the "Executive [is not] required to make a determination of actual or potential domestic market disruption before imposing import restraints on textiles." We reverse the judgment on jurisdictional grounds and direct that the suit be dismissed.

3. *Standing to Sue:*

We have serious doubts as to the standing of the Consumers Union to sue. The complaint alleges that the suit is brought on behalf of Consumers Union as well as its members "who are purchasers and consumers of textiles . . . which are or may be subject to quantitative import limitations . . . and Consumers Union and its members are and will be injured directly, irreparably, and in fact, in their capacity as consumers, by the imposition of restraints on the importation of textiles and textile products in the absence of legally required determinations with respect to 'market disruption' or 'real risks of market disruption' "; and that Consumers Union itself annually purchases, for testing and other purposes, in excess of $15,000 worth of textiles and textile products which are or may be subject to "quantitative import limitations". However, this being a declaratory judgment action in which the requirements for standing are strict, *Tileston* v. *Ullman*, 312 U.S. 44, 45 (1943), we doubt if standing exists. The purpose of the Act is to prevent "market disruption of textiles in the United States." The textile purchases by Consumers Union are for "testing purposes", rather than for consumer use. The purpose of Section 204 would hardly be affected by the importation of $15,000 of textiles a year for testing purposes. On application, it might well be allowed.

4. *Exclusive Jurisdiction of the Customs Court:*

However, we need not and do not pass on the question of standing since we conclude that the Customs Court has exclusive jurisdiction of such actions under 28 U.S.C. § 1582. This section places "exclusive jurisdiction [in the Customs Court] of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, where the administrative decision, including all orders and findings entering into the same, involve . . . (4) the exclusion of merchandise from entry or delivery under the provisions of the customs laws." It can hardly be doubted that quantitative limitations on imports are a part of the customs law and that import laws directed at the protection of a particular industry are part and parcel of the same general body of law. This conclusion is buttressed by the fact that the Customs Court has frequently exercised such jurisdiction. See *Yoshida International, Inc.* v. *United States*, 378 F. Supp. 1155 (E.D. Pa. 1974), *rev'd on other grounds*, 526 F. 2d 560 (C.C.P.A. 1975); *Western Dairy Products Inc.* v. *United States*, 373 F. Supp. 568 (1974), *aff'd*, 510 F. 2d 376 (C.C.P.A. 1975), and cases cited. *Consumers Union* v. *Kissinger*, 506 F. 2d 136 (D.C. Cir. 1974) is said to be to the contra. But in that case, the "voluntary import restraint undertakings" were not legally binding and could not be implemented by the Customs Service. *Id.* at 143. There could, as a result, never have been a decision by a Customs official upholding the restraint and opening up the protest procedure which affords access to the Customs Court. Here, however, if anyone wishes to challenge the Committee's action, he can do so as other challenges of that nature are made, i.e. as an importer or as an American manufacturer, producer or wholesaler, bringing textiles into the United States. The provisions of 19 U.S.C. § 1514 then

come into play. It provides that "all decisions of the Collector . . . excluding any merchandise from entry or delivery under any provision of the custom laws . . ." are final unless the person aggrieved files a protest with the Collector. Upon its denial, he may bring an action contesting the refusal to allow the merchandise to enter in the Customs Court, 28 U.S.C. § 2332, and its action is reviewable by the Court of Customs and Patent Appeals. 28 U.S.C. § 2638. This exclusiveness is buttressed by 28 U.S.C. § 1340 which gives "original jurisdiction of any civil action arising under any Act of Congress" to the District Court, "*except matters within the jurisdiction of the Customs Court*" [emphasis supplied].

The judgment is therefore reversed, and the cause is remanded with instructions to dismiss the same.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SEPTEMBER TERM, 1977

No. 75 ———

Docket No. 77-6092

(Argued September 19, 1977 Decided November 10, 1977)

SNEAKER CIRCUS, INC., BLAZER SPORTS INTERNATIONAL, INC. AND BOB WOLF ASSOCIATES, INC.,
Plaintiffs-Appellants,

v.

JIMMY CARTER, President of the United States, ROBERT S. STRAUSS, Special Representative for Trade Negotiations, STEPHEN J. LANDE, Deputy Special Representative for Trade Negotiations, and UNITED STATES INTERNATIONAL TRADE COMMISSION,
Defendants-Appellees.

Before: KAUFMAN, Chief Judge, SMITH and ANDERSON, Circuit Judges.

Appeal from denial of injunctive relief and dismissal of complaint by footwear importers attacking validity of trade agreements with the Republic of Korea and the Republic of China for lack of subject matter jurisdiction, in the United States District Court for the Eastern District of New York, Mark A. Costantino, *Judge*.

Reversed and remanded.

VITO VINCENTI (Vincenti & Schickler, New York, N.Y., Jonathan S. Gaynin, Kenneth M. Weinman and Robert F. Moraco, of counsel), *for Appellants.*

JOAN M. DOLAN, Assistant U.S. Attorney (David G. Trager, U.S. Attorney for the Eastern District of New York, Bernard J. Fried, Assistant U.S. Attorney, of counsel), *for Appellees.*

SMITH, *Circuit Judge*:

This is an appeal from a judgment entered in the United States District Court for the Eastern District of New York, Mark A. Costantino, *Judge*, which denied injunctive relief and dismissed the complaint for want of subject matter jurisdiction. Appellants Sneaker Circus, et al., retailers, wholesalers and importers of footwear, sought injunctive and declaratory relief to invalidate certain U.S. trade agreements with the Republic of Korea and the Republic of China,[1] which were negotiated pursuant to the Trade Act of 1974, 19 U.S.C. §§ 2101 *et seq.* We find error in the determination of lack of subject matter jurisdiction and reverse and remand.

The Trade Act of 1974 is designed to encourage "open and nondiscriminatory world trade" by providing, *inter alia*, procedures for safeguarding American industry and labor against injurious import competition. The Act authorizes the President to negotiate orderly marketing agreements with foreign countries after reviewing recommendations prepared by the International Trade Commission.

The agreements in question limit the quantity of footwear exported from the Republic of Korea and the Republic of China to the United States during a four-year period, and are enforced by sanctions imposed by the

[1] 42 Fed. Reg. 32440 (1977).

foreign governments. The role of the U.S. Customs Service, under the terms of the agreement, is to count footwear arriving in this country to determine that quantities do not exceed the terms of the agreement, and to check goods for valid export visas.

In its complaint, Sneaker Circus asserts that these trade agreements are invalid, because they were not negotiated in conformity with the procedural requirements of the Act. It is further alleged that the failure to hold statutorily required public hearings represents a violation of the appellants' due process rights under the United States Constitution.[2]

The District Court did not reach the question of whether the trade agreements were concluded in conformity with statutory and constitutional requirements, nor do we. The question at issue is, rather, which federal court, if any, is the appropriate forum for the determination of the validity of the Trade Agreements. Sneaker Circus argues that the case raises federal questions which require the interpretation of the fifth amendment to the United States Constitution and the Trade Act of 1974; that it is barred, by the terms of the agreements, from litigating these issues in the U.S. Customs Court; and that consequently the District Court has jurisdiction of the matter, pursuant to 28 U.S.C. §§ 1131, 1337 and the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*

Appellee U.S. Government officials argue to the contrary that 28 U.S.C. 1582(a), as amended, assigns the Customs Court exclusive subject matter jurisdiction over this case.

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[2] Appellants also assert that the agreements violate § 1 of the Sherman Act, 15 U.S.C. § 1, as a restraint of foreign and interstate commerce, and that they violate the General Agreement on Tariffs and Trade and the Treaty of Friendship, Commerce, and Navigation entered into between the United States and the Republic of Korea.

As we noted in our opinion in *J. C. Penney Co.* v. *U.S. Treasury Department*, 439 F.2d 63 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971), it is the general rule that disputes which concern the customs laws of the United States, and which arise under the Tariff Act of 1930, as amended, may be adjudicated only in the Customs Court pursuant to the grant of exclusive jurisdiction in 28 U.S.C. § 1582(a). This is the case even when those disputes are largely constitutional in nature, and even when they have not yet "ripened" sufficiently to permit immediate adjudication as justiciable "cases or controversies." [3] This rule is supported both by sound considerations of policy and by consistent historical precedent.[4]

In *Patchogue-Plymouth Mills Corp.* v. *Durning*, 101 F.2d 41 (2d Cir. 1939), and in *David L. Moss Co.* v. *United States*, 103 F.2d 395 (Cust. & Pat. App. 1939), the courts indicated that jurisdictional exclusivity was a necessary condition of the uniform and consistent application of the customs laws.

There is, however, an exceptional class of cases which, while arising under the Tariff Act of 1930, is for practical or jurisprudential reasons, barred from the Customs Court by statute. In these cases, and in these cases alone, jurisdiction is vested in the District Courts by virtue of 28 U.S.C. §§ 1331 and 1337.[5] While this exceptional category must be narrowly construed so as not to defeat the policy justifications of the general rule, it is, nevertheless, well-grounded in federal practice and precedent. See *Timken Co.* v. *Simon*, 539 F.2d 221 at 226 n. 7 (D.C. Cir. 1976).

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[3] 439 F.2d at 67-68.

[4] 439 F.2d at 66.

[5] We assume, *arguendo*, that all other statutory requirements have been satisfied.

The case at bar is among these exceptions to the exclusive jurisdiction of the Customs Court.

28 U.S.C. § 1582, which delineates the jurisdiction of the Customs Court, reads in pertinent part:

> (a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930 as amended, has been denied, in whole or in part, by the appropriate customs officer, where the administrative decision, including the legality of all orders and findings entering into the same, involves: . . . (4) the exclusion of merchandise from entry or delivery under any provisions of the customs laws. . . . (c) The Customs Court shall not have jurisdiction of an action unless (1) either a protest has been filed, as prescribed by section 514 of the Tariff Act of 1930, as amended, and denied in accordance with the provisions of section 515 of the Tariff Act of 1930, as amended, or if the action relates to a decision under section 516 of the Tariff Act of 1930, as amended, all remedies prescribed therein have been exhausted. . . .

Under the terms of the Act, Customs Court jurisdiction is invoked only when an individual protests a specific administrative ruling made at a United States port of entry, and when that protest has been denied.

In the present case, the trade agreements regulate export from a foreign nation. Violation of these export limits subjects the foreign exporter to heavy civil and criminal sanctions in the country of export.[6] There is accordingly every likelihood that the agreements will be

[6] See, for example, General Export and Import Law of the Republic of Korea, Law No. 1878, as amended (Jan. 16, 1967); Export Inspection Law of the Republic of Korea, Law No. 1164, as amended (Oct. 4, 1962).

effectively enforced abroad, with the result that no occasion for protest under section 514 will ever present itself, and no Customs Court jurisdiction under 28 U.S.C. § 1514 will arise. The point is not that the dispute is not presently ripe for adjudication in the Customs Court, but rather that the case will never ripen sufficiently to meet the statutory requirements for jurisdiction. When this situation occurs, jurisdiction over a customs matter which presumptively inheres in the Customs Court reverts to the District Court under 28 U.S.C. §§ 1331 and 1337.[7]

Our decision today is consistent with two recent cases decided in the Court of Appeals for the District of Columbia. In *Timken Co.* v. *Simon*, *supra*, 539 F.2d 221, decided under the Anti-Dumping Act, 19 U.S.C. §§ 160 *et seq.*, the court found that because goods had entered the country prior to the effective date of the Act, and because the Act functions prospectively, there could in principle be no opportunity for protest under the terms of section 516, and thus no effective access to the Customs Court. In this special circumstance, the court noted: "Since Timken has *no remedy* pursuant to section 516 in the Customs Court, we decline to hold that the District Court lacked jurisdiction over this action." 539 F.2d 221 at 226 n. 7.

Similarly, in *Consumers Union of United States, Inc.* v. *Kissinger*, 506 F.2d 136 (D.C. Cir.), *cert. denied*, 421 U.S. 1004 (1974), import restraints were voluntarily accepted by private companies, and enforced abroad. Thus there could never, in principle, have been a Customs Service decision which could be protested under section 514. Accordingly, the Customs Court lacked jurisdiction under 28 U.S.C. § 1582, and jurisdiction was accepted by the District Court.[8]

[7] We do not reach the issue of whether jurisdiction may also be predicated on 28 U.S.C. § 1361 or 5 U.S.C. § 702.

[8] The court in Consumers Union did not specifically address this matter.

The government asserts that as a factual matter appellants will be able to protest the actions of customs officials on at least three types of occasions, and so come within Customs Court jurisdiction: (1) They can order goods without first obtaining a visa, and protest the refusal by Customs officials to permit entry; (2) They can protest the counting of shipments with visas against the quotas; and (3) They can protest if goods in excess of the quotas are refused entry.[9]

The first and third of these supposed occasions, however, require that foreign exporters risk substantial liability by violating the trade agreements. And the second occasion is simply not one of the opportunities for protest acknowledged by the statute. In short, the government's effort to fit the present case within the rubric of 28 U.S.C. § 1582 is contrived at best. We cannot condition the adjudication of a case of this type on the subjection of appellants and their trading partners to foreign punishment.[10]

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[9] The government advanced the position at oral argument that the decision to classify goods according to revised tariff categories, established pursuant to the trade agreements, provides a ground for challenging the new classification under 19 U.S.C. § 1514. That section, however, indicates that decisions affecting "the classification and rate and amount of duties chargeable" may be challenged. We infer from the terms of the statute that where, as in the instant case, a reclassification would have no effect on either the rate or amount of duty payable, no opportunity for challenge exists. It follows that there is no access to the Customs Court.

[10] See, for example, the line of cases which holds that production of documents should not normally be ordered if such an order would cause an individual to violate foreign law. *Application of Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962); *Ings* v. *Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960); *First National City Bank of New York* v. *IRS*, 271 F.2d 616, 619 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960). But compare *Arthur Andersen & Co.* v. *Finesilver*, 546 F.2d 338 (10th Cir. 1976), *cert. denied sub nom. Arthur Andersen & Co.* v. *Ohio, et al.*, —— U.S. ——, 97 S.Ct. 1113 (1977).

II.

It might be urged that even if the Customs Court lacks jurisdiction of this case, this does not imply that jurisdiction necessarily inheres in the District Court, pursuant to 28 U.S.C. §§ 1331 and 1337. On this view, there may be an implied statutory unreviewability of cases which implicate the customs laws but which fail to meet the requirements of 28 U.S.C. § 1582. Against this we might simply note Justice Brandeis' famous dictum:

> The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. [*St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 84 (1936)]

and the presumption of reviewability reflected in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), and its progeny.[11]

A review of the Act's legislative history gives no indication that Congress wished to withhold judicial review in this area. While the Congress does stress the need for "extensive negotiating authority" vested in the executive, and the importance of legislative oversight of trade agreements, nowhere does it indicate that this oversight is intended to be exclusive. *See* 1974 *U.S. Code Cong. & Ad. News* 7186.[12]

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[11] See also *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971); *Barlow* v. *Collins*, 397 U.S. 159 (1970); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970); *Timken Co.* v. *Simon*, 539 F.2d 221 at 227 (D.C. Cir. 1976).

[12] And indeed the Congress specifically recognized the legitimacy of Customs Court review of some challenges to presidential actions. 1974 *U.S. Code Cong. & Ad. News* at 7363.

III.

Finally, our determination that the District Court may assume jurisdiction in this case, all other requirements being met, does not, of course, end discussion of the matter. For to be decided on its merits, a case must not only meet jurisdictional requirements, but must also be justiciable per se. *Baker* v. *Carr*, 369 U.S. 186 (1962). That is, it must be the kind of case which provides an appropriate occasion for judicial decision-making.

"Justiciability is itself a concept of uncertain meaning and scope." *Flast* v. *Cohen*, 392 U.S. 83 at 95 (1968). As applied in the instant case, justiciability implicates three main concepts. First, to be justiciable a case must not involve a "political question." Second, plaintiffs must be able to demonstrate that they have standing to bring suit. Third, the case must be "ripe" for adjudication.

The Supreme Court has characterized a "political question" in the following terms:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. [*Baker* v. *Carr*, 369 U.S. at 217 (1962)].

Among the matters traditionally recognized as deserving of broad executive and legislative discretion are those which concern the conduct of foreign affairs.

> The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision. [*Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918)].

This is because, in the language of *Baker* v. *Carr*, this area often involves standards which are difficult to formulate and apply, and may demand a "single-voiced statement of the Government's views."

Where, as in the instant case, the central issue turns on the formulation and implementation of agreements with foreign powers, it may be thought non-justiciable, because necessarily involving political questions.

It is important to recognize, however, that Sneaker Circus does not, in the first instance, challenge the *substance* of the trade agreements. Were it to do so, we would be unable to consider the case on its merits, for it would then be nonjusticiable in the sense noted above. Sneaker Circus, rather, challenges the *procedures* employed by the Executive in concluding these agreements, procedures which are mandated by statute, and which accordingly are within the proper supervision of the federal courts. It is by now a commonplace that an agency's violation of its own procedures may constitute a denial of due process, adjudicable in the courts. *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954).

Whether appellants in this case show the requisite standing to bring suit—*Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); L. Jaffe,

Judicial Control of Administrative Action 501-31 (1965); K.C. Davis, *Administrative Law Treatise* §§ 22.00-22.04, 22.07, 22.11-22.14, 22.19-22.21 (Supp. 1970); Jaffe, *Standing Again*, 84 Harv. L. Rev. 633 (1971)—and whether the case is presently "ripe" for adjudication—*Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); K.C. Davis, *Administrative Law Treatise* §§ 21.01-21.10; Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 Mich. L.Rev. (1971)—are issues which cannot be determined on the present state of the record. These are, however, threshold questions which must be determined by the District Court before adjudication on the merits can proceed.

Reversed and remanded.